

DATA PORTABILITY AND INFORMATIONAL SELF-DETERMINATION

by

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The proposal of the Data Protection Regulation (hereinafter “DPR”) introduced the right to data portability. Pursuant to art. 15 of the DPR in a version adopted by the European Parliament where the data subject has provided the personal data, where personal data are processed by electronic means, to obtain from the controller a copy of data undergoing processing in an electronic and interoperable format which is commonly used and allows for further use by the data subject without hindrance from the controller from whom the personal data are withdrawn. Where technically feasible and available, the data shall be transferred directly from controller to controller at the request of the data subject.

The data portability increases informational self-determination of the data subject. Informational self-determination is associated with information privacy. The data subject may determine whether and to whom he/she discloses his/her personal data. The decision about the disposition should be made freely without any interference from a third person in order that the information self-determination is preserved. Nevertheless, the right to data portability, in other words the legal possibility of data transfer, opens the doors to the providers to attract users with even more personalized services. This may result in less informational privacy of the users. This article deals with the right to data portability in relation to informational self-determination and informational privacy.

KEYWORDS

data portability, information self-determination, data protection regulation

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1. INTRODUCTION

The draft of the Data Protection Regulation (hereinafter: “the DPR”)[1] introduced the right to data portability. Nowadays, the internet user of a website may download his/her personal data and other information uploaded during the use of the website.[2] The data extraction and their transmission to another provider which the user chooses should strengthen the possibility of the data subject to determine to whom he/she provides the personal data.

In 2012 The European Commission (hereinafter: “the Commission”) released a first version of the DPR (hereinafter “the Draft”). Pursuant to art. 18 of the Draft the data subject shall have the right, where personal data are processed by electronic means and in a structured and commonly used format, to obtain from the controller a copy of data undergoing processing in an electronic and structured format which is commonly used and allows for further use by the data subject.

Where the data subject has provided the personal data and the processing is based on consent or on a contract, the data subject shall have the right to transmit those personal data and any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn.

In March 2014 the European Parliament (hereinafter: “the Parliament”) adopted the proposal of the DPR (hereinafter: “the Proposal”). In the Proposal the right to data portability has been incorporated in art. 15 of the DPR regulating the right to access and to obtain data. Pursuant to art. 15 (2a) where the data subject has provided the personal data where the personal data are processed by electronic means, the data subject shall have the right to obtain from the controller a copy of the provided personal data in an electronic and interoperable format which is commonly used and allows for further use by the data subject without hindrance from the controller from whom the personal data are withdrawn. Where technically feasible and available, the data shall be transferred directly from controller to controller at the request of the data subject.

The data portability should enlarge the informational self-determination of the data subject, in other words, it should provide the data subject with the control over the personal data. It is up to the data subject to determine

who will get access to the data, for what purpose and for how long. The right to data portability in accordance with the DPR does not contain the right to data portability as one single right, but rather as two separate rights, namely the right to obtain a copy from the controller and the right to data transfer.

First, the article will introduce the concept of informational self-determination. Then, the two abovementioned rights relating to the data portability will be discussed as proposed by the Commission and the Parliament.

2. INFORMATIONAL SELF-DETERMINATION

In the well-known German census decision, the German Federal Constitution Court defined the informational self-determination as a personality right, which ensures the individual the right to control the issuing and utilization of the personal data.[3] The informational self-determination resembles the Westin's definition of privacy as "*the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.*"[4]

The informational self-determination encompasses a control over the individual's personal data. The control may be exercised by the individual if only he/she is aware of the rights and of the means to claim those rights. Without awareness of the right, this right becomes meaningless in practice. The control cannot be maintained in case of the individual's ignorance in relation to a particular legal instrument.

In order that the individual may keep the control, he/she has to be informed not only about the identity of controllers and the purpose of processing, but also about all rights that the individual has to his/her personal data. In other words, the preservation of the right to informational self-determination implies transparency of processing.

The transparency is emphasized in the Recital 48 of DPR. The principles of fair and transparent processing require that the data subject should be informed in particular of the existence of the processing operation and its purpose, how long the data will be stored, on the existence of the right of access, rectification or erasure and on the right to lodge a complaint. Pursuant to art. 11 of the DPR the controller shall have concise, transparent, clear and easily accessible policies with regard to processing of personal data and for the exercise of data subjects' rights.

The informational self-determination of the individual would be ensured by the concept of proprietary rights to personal data. “[...] *data portability have been connected to and considered as a logical extension of the notion of informational self-determination and the individual’s default entitlement to control disclosure and further processing of his/her personal data.*”[5] The portability resembles an action of physical transfer of an object. The object is taken from one place and carried over to another one. In case of data portability the object of transfer should be theoretically the individual’s data.

3. THE DATA PORTABILITY IN THE DPR

In the Draft adopted by the Commission the right to data portability was considered as a separate right regulated by the art. 18 of the DPR. In November 2013 the Committee on Civil Liberties, Justice and Home Affairs (hereafter: “the LIBE Committee”) issued its report on the proposal for the regulation.[6] In its report the LIBE Committee has incorporated the data portability into art. 15 regulating the right to data access. It implies that the LIBE Committee considers the right to data portability as a specification of the right to data access.

On 12 March 2014, the European Parliament adopted the text in accordance with the above mentioned report. The Parliament approved the right to data portability as a part the right to data access.

Nevertheless, the right to data access has another objective. The data subject will claim this right if he/she desires to have knowledge about the data that the controller processes and about aspects of such processing. The right to access is just a prerequisite for the right to data portability and the informational self-determination. Without awareness of the personal data which are processed, the data subject could not make use of the right to data portability.

The right to data portability may be subdivided into two separate legal rules, namely the right to obtain a copy of the data and the right to data transfer.

3.1 RIGHT TO OBTAIN A COPY

Pursuant art. 18 (1) of the Draft the data subject shall have the right, where personal data are processed by electronic means and in a structured and commonly used format, to obtain from the controller a copy of data under-

going processing in an electronic and structured format which is commonly used and allows for further use by the data subject.

This right could be called the right to obtain a copy of data. The data subject obtains a copy of the data processed by the controller. The condition for obtaining a copy, in accordance with the version of the Commission, was the processing of the data by electronic means and in a structured and commonly used format. When the controller would not process the personal data by electronic means and in a structured and commonly used format, the data subject would not have the right to be provided with a copy of personal data.

The majority of personal data is currently processed electronically. Formats in which the data are processed differ. The right to obtain a copy, pursuant to the Draft, is guaranteed only to the data subject, whose data are processed in a structured and commonly used format. If the format is not structured or commonly used, the data subject does not have the right to obtain a copy. However the Draft does not give the data subject the right to decide in which format the personal data will be processed by the controller, nor does the Draft oblige the controller to inform the data subject about the format of processing. The requirement for the structured and commonly used format might lead either to irrelevant differentiation of the data subject or to setting of new obligation for the controllers to process the data in formats laid down by the Commission.

The groundless differentiation of the data subjects might lead to a disadvantage of one group of data subject that would not be able to exercise its right to data portability. This differentiation might inspire the controllers not to use standard and commonly used formats in order to be relieved of the obligation to hand over the copy and hereby to avoid the migration of the data subjects to another service provider and to spare costs related to provision of the copy.

A solution to the differentiation described above would be an obligation laid down by the Commission to process personal data only in a standard format which is at present commonly used. This solution is problematic because of two reasons. First, the data protection legislation would impose new obligation on the controllers relating to data processing. Second, the list of obligatory used formats would suppress the progress in developing and promoting new formats. The latter reason is controversial and untenable in the long term.

Pursuant to art. 15 of the Proposal where the data subject has provided the personal data where the personal data are processed by electronic means, the data subject shall have the right to obtain from the controller a copy of the provided personal data in an electronic and interoperable format which is commonly used and allows for further use by the data subject without hindrance from the controller from whom the personal data are withdrawn.

The Parliament left out the requirement of the structured and commonly used format. On the other hand it conditions the claim to obtain a copy on the requirement of the provision of the data by the data subject. The data subject may not be differentiated on basis of the used formats but on the fact whether or not they have provided the data to the controller by themselves.

Since the Proposal does not mention the processing on the basis of any specific legal entitlement laid down in art. 6 of the DPR, it could be inferred that the data subjects may obtain a copy in case that the controller has been provided with the data directly by the data subject irrespective of the legal entitlement for the processing. Let's imagine that the controller is an employer which processes the personal data of his employees relating to health insurance and social security insurance. He processes the data pursuant to art. 6 (1) c) of the DPR (processing is necessary for compliance with a legal obligation to which the controller is subject). In case that the data are provided by an insurance company, the employee cannot claim a copy of the data. Another employee who gives the data to the employer himself will have the right to obtain the copy. The Proposal introduces the discrimination on the basis of a data source.

Although, the Parliament declined the condition of the standard and commonly used format as the requirement for obtaining a copy, the informational self-determination of the data subject has not been enhanced due to the requirement of the provision of the data by the data subject.

Neither the Draft, nor the Proposal does set any period in which the controller has to hand over a copy of the data to the data subject. In accordance with the Draft, the data subject shall have the right to obtain a copy of data without delay from the controller. The Proposal does not even contain reference to a time period. It merely obliges the controller to provide a copy to the data subject without hindrance. The hindrance may be also disproportionate period of time.

The right to obtain a copy guarantees the informational self-determination of the data subject to some extent. The data subject has the right to be provided with a copy; nevertheless, the handing over of the copy does not automatically signify an erasure of the data. The data subject has therefore only partial control over his/her personal data. He/she may dispose only of the copy, unless she claims her right to erasure pursuant to art. 17. The informational self-determination would be preserved to a larger extent if the data subject is clearly informed about the possibility of data erasure.

The formulation of the Draft is further discriminatory in relation to the data subjects whose personal data are processed in an untraditional format. It means that the informational self-determination of these data subjects is simply limited by the decision taken by the controller about the system of the processing. The Proposal left the abovementioned condition out. Nevertheless the right to obtain a copy is denied to data subject whose personal data has been provided to the controller by a third party.

3.2 RIGHT TO DATA TRANSFER

The second paragraph of art. 18 of the Draft provides the right to data transfer. The data subject shall have the right to transmit those personal data and any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn in case the data subject has provided the personal data and the processing is based on consent or on a contract. The right to data transfer, in a version adopted by the Commission, applies only to the data subject whose personal data are processed on the basis of consent or a contract. If the data are processed on the basis of the other legal entitlement in accordance with art. 6 of the DPR, the data subject cannot claim the right to data transfer to another controller. The controller that processes the data on the basis of the other legal requirement (e.g. a telecommunication company offering services on the basis of the communication history of a user) is not obliged to transfer the data to the controller chosen by the data subject. The data subject may hand over the data on the copy obtained on the basis of the first paragraph of the art. 18 of the Draft.

The data transfer may be carried out solely if it is the data subject who has provided the data to the controller. Provided that the data are acquired by the controller from a third person and subsequently the controller enters

into a contract with a data subject, this data subject does not have the right to data transfer. The right to data portability may be only realized by requiring the copy. The informational self-determination in connection with the right to data transfer is even more limited than by the right to a copy.

Another problematic issue that emerges in the second paragraph is the transfer of personal data and any other information provided by a data subject. The transmitted information might relate to third persons. The information might have a form of personal data of the third persons including their pictures, interest and hobbies. After the transfer this information will be stored in a system of another controller and serve for marketing purposes and as a precious source of potential clients. On the other hand, the controllers may create profiles based on the data provided by data subjects and data about their behaviour which are not anymore linked to individual data subjects. *"Data that is truly created by the site, for operational or analytic purposes, presumably does not fall within the definition of 'other information provided by the data subject'."*[7] Only data subjects whose data are processed on the basis of consent or contract have the right to transfer the data from one controller to another one.

If the controller processes the data on the basis of other legal entitlements than consent or a contract, the information self-determination of the data subject is limited to requests for a copy or eventually for the data erasure. He/she cannot however handle the data in the sense of voluntary act of transfer.

Another aspect of art. 18 (2) which limits the informational self-determination is the fact that the transfer is feasible only in case that the data subject provided the controller the data and other information. It means that the data may enjoy the informational self-determination provided that she was entitled to dispose with the data prior to their provision to the current controller.

Art. 18 (2) may restrict the informational self-determination of other data subjects who did not claim the right to data transfer. The provision as it is actually formulated enables the data subject to transfer any other information provided by the data subject. Personal data relating to other data subject may be released in the form of posts, photos or videos. The informational self-determination of the data subject does not exist unless the contact details are known to the controller and at the same time the data subject is informed by the controller.

The Proposal changed the formulation of this right. The data shall be transferred directly from controller to controller at the request of the data subject, where technically feasible and available. The wording of the Proposal implies that the Parliament set down for the data transfer the same requirements as it does for the obtaining a copy. The right to data transfer is guaranteed only to the data subject that provided the data to the controller. If the controller obtains the data from another source, the data could not be transferred. In contrast to the Draft, the particular legal entitlement for the processing pursuant to art. 6 is not relevant. Whenever the data subject provided the data to the controller, he/she can claim the data transfer from one controller to another, in so far as it is technically feasible and available. It will be the controller which determines the feasibility and availability.

The Parliament did not approve the transfer of other information provided by the data subject. The personal data or other information about another individual will not be subject to the transfer in according to the Proposal. The Proposal strengthened the right to informational self-determination of the data subject. However it continues to differentiate among the data subjects. The informational self-determination of those who provided the data to the controller is increased by omitting the condition of a particular legal entitlement (consent or contract). On the other hand, the informational self-determination of the data subject whose personal data has been obtained by the controller from a third party is deteriorated. The latter group of data subject may not even demand a copy from the controller to hand it over to another controller.

Although the provision laid down the obligation to the controller to transfer the data without hindrance, it is left up to the discretion of the controller to determine when the data transfer will be realized.

In order to keep the data subject using the service the controller may offer him/her special services or advantages (e.g. vouchers, points or other gifts). The controllers may also use a lock-in strategy.[8] The lock-in strategy consists of a customer dependency on a vendor by substantial switching costs.[9] The data subjects might lose well arranged agenda, organizer or whole bundle of services offered by the controller. The broader the offer is, the higher the switching costs are for the data subject. At the moment that the costs are too high for an individual data subject, he/she will probably not make use of the right to data transfer.

3.3 RIGHT TO BE FORGOTTEN

As mentioned above, the portability is in a way similar to an action of physical transfer of an object. The data would be taken from one controller and, eventually, handed over to another. However, the draft does not contain a subsequent obligation for the controller to erase the data which has been processed. The information about the right to erasure is neither laid down in art. 11. Unless the consent of the data subject is withdrawn or the other legal entitlements for data processing pursuant to art. 6 ceased to exist; the data controller may continue to process the personal data. Along with the providing a copy and with the data transfer, the controller should inform the data subject about the right to be forgotten pursuant to art. 17.

4. CONCLUSION

The data portability may be perceived as the possibility for the data subject to move the data to another controller with the effect of erasing the data from the system of the previous one. The data portability in this sense would ensure the control of the data subject with respect to his/her data, and herewith to guarantee the informational self-determination.

The data portability proposed in the DPR may be considered as two relatively separate rights, the right to obtain a copy from the controller and the right to data transfer. Even though, the rights enhance the informational self-determination of the data subject, neither the right to a copy, or the right to data transfer guarantees the entire control over the data. Besides that, the proposals differentiate unjustifiably among the data subject.

The right to data portability in both forms guarantees the control over the data by the data subject and control over those data although the informational self-determination as proposed in the DPR is limited.

The DPR should be reconsidered in order to broaden the scope of informational self-determination by means of obligatory data erasure after that the data subject claims either the right to obtain a copy or the right to data transfer. The DPR should not make differences among the data subjects neither on the basis of formats and systems, nor the person that has provided the data to the controller.

REFERENCES

- [1] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final from 25 January 2012.
- [2] The download of the data is offered e.g. by the Google Takeout. 'Your account, your data. Download a copy.' Google [online]. Available at <https://www.google.com/settings/takeout>.
- [3] German Federal Constitutional Court (BVerfG, 15 December 1983). Available at <http://www.servat.unibe.ch/dfr/bv065001.html#Rn003>.
- [4] Westin, A. 1967, 'Privacy and Freedom', Bodley Head, London. p. 7.
- [5] Purtova, N. 2011 'Property Rights in Personal Data: A European Perspective', Uitgeverij BOXPress, Oisterwijk, p. 237. Available at <http://arno.uvt.nl/show.cgi?fid=114387>.
- [6] The Committee on Civil Liberties, Justice and Home Affairs. Draft report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) 2012/0011(COD), 17 December 2012, p. 92.
- [7] Swire, P., Lagos, Y. 2013, 'Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique', Maryland Law Review, vol. 72, no. 2, p. 347. Available at <http://digitalcommons.law.u-maryland.edu/cgi/viewcontent.cgi?article=3550&context=mlr>.
- [8] *Id.*, p. 338.
- [9] Vendor lock-in, Wikipedia [online]. Available at http://en.wikipedia.org/wiki/Vendor_lock-in.